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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
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Amendment of the Commission's	)	**WT Docket No. 96-6**
Rules to Permit Flexible	)	
Service Offerings in the	)	
Commercial Mobile Radio Services	)	

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To: The Commission

COMMENTS OF THE RURAL TELECOMMUNICATIONS GROUP

The Rural Telecommunications Group ("RTG"), by its attorneys, hereby respectfully submits these comments in response to the *First Report and Order and Further Notice of Proposed Rulemaking* ("*FNPRM*"), released by the Federal Communications Commission ("FCC" or "Commission") on August 1, 1996, in WT Docket No. 96-6. These comments advocate broad forbearance from the imposition of Title II regulations on the fixed services provided by commercial mobile radio service ("CMRS") licensees.

STATEMENT OF INTEREST

The RTG is an organized group of rural local exchange carriers whose purpose is the diligent pursuit of fair treatment and new opportunities for rural telecommunications providers. RTG's members include CMRS licensees who are investing in the latest mobile technologies so that their customers can enjoy as wide a selection of telecommunications options as their urban counterparts. Because RTG's members serve remote, high-cost, low-density-population areas, their expenses are a critical factor in their ability to provide the highest quality technologies at affordable rates. Adherence to regulations always carries a

price, and as strict scrutinizers of the bottom line, RTG's members are uniquely qualified to comment on the Commission's proposals for regulation of the fixed services that are an integral component of the services offered by rural CMRS providers.

I. COMMENTS

A. The Offering of Fixed Services Has No Bearing on the Inherently Mobile Nature of Commercial Mobile Radio Services

The category of radio services known as "CMRS" are statutorily subject to the provisions of Title III of the Communications Act of 1934, as amended ("the Act").[1] In determining whether CMRS licensees should be subjected to Title II regulations with respect to their provisioning of fixed services, the Commission should consider the inherent nature of CMRS. By design, one cannot take the "mobile" out of commercial mobile radio service. Any communications technology that is designed to operate freely away from a base station is CMRS. The fact that cellular radio, specialized mobile radio ("SMR"), and personal communications services ("PCS") can be used in a stationary manner, say from a desktop, in no way detracts from the reality that each of these radio systems has the innate capability of mobility simply by being transported to another location for use. Landline telephone service does not have this capability.

An attempt to regulate the fixed operations of these systems would subject carriers to "multiple layers of regulation," which the Commission has recognized as an undesirable effect

[1] Specifically, mobile radio services must comply with Section 332 of the Communications Act. 47 U.S.C. § 332.

that could discourage the development of integrated networks.[2] The Commission has also stated, in the context of the creation of the CMRS category, that: "By refusing to tie the definition of functional equivalence to particular mobile service technologies, we have sought to avoid creating rules that cause mobile radio service providers to be reclassified because of the technological changes in the way they deliver essentially the same services."[3] Requiring CMRS licensees to comply with Title II regulations would require licensees to accurately distinguish exactly when their systems are being used in a fixed manner in order to determine whether they are subject to Title II or Title III regulation,[4] an impossible task. CMRS licensees make available to the public wireless systems that are functional in both fixed and mobile modes, and it is up to the end user to decide at any given moment how he shall operate the system. CMRS licensees cannot monitor every single use of each radio they provide to the extent that discrete fixed and mobile uses could be discerned. The "capability of mobility" of each CMRS system is inherent, and an end user who may utilize a system from the desktop for months may one day pick it up and take it along for mobile use; ostensibly because that it is why it was purchased.

When a CMRS system is used in a fixed mode, its similarities to landline telephone service may be indistinguishable to the end user, but the similarities end there. A landline

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[2] *In re* Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *First Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-6 (released August 1, 1996) at ¶40.

[3] *In re* Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, *Second Report and Order*, 74 RR 2d 835 (1994) at ¶25.

[4] Only the fixed aspects of CMRS services could possibly be subject to Title II regulation; all the mobile aspects of CMRS fall under the purview of Title III of the Communications Act.

telephone system can never be a mobile system, as this is not a part of its inherent design. You can take the "fixed" out of CMRS, but you cannot take the "fixed" out of landline service. A CMRS system's mobility or capability of mobility is inherent in its design, and mobility is the feature that sets it apart from landline telephone service. The concept of CMRS wasn't developed in a vacuum; it's genesis is owed to the desires of the consumer to be free from the tether of his or her wired telephone. CMRS is not a substitute for landline services, it is an alternative to landline service. CMRS systems are purchased for their mobility. While it may be fair to insist that like systems be treated alike, it must be understood that landline systems and mobile systems are *not like systems*, and the FCC has no business regulating CMRS systems like Title II common carriers.

B. Imposing Title II Regulations on CMRS Licensees is Both an Inappropriate Application of These Rules and the Perpetuation of a Regulatory Regime That Congress and the Commission are Striving to Eliminate

RTG speculates that landline local exchange carriers ("LECs"), and not the Commission, are truly behind the quest to have CMRS fixed services regulated under Title II of the Act.[5] It is understandable that landline LECs may feel discriminately burdened by the requirement to file tariffs, rate changes, and Section 214 authorizations when their wireless counterparts, who in some form may be providing a variation of local exchange service, do not. It must be borne in mind, however, that all regulations arise from a need to address a

[5] *See e.g.,* Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies in *In re* Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *Notice of Proposed Rulemaking,* WT Docket No. 96-6 (filed February 26, 1996).

distinct purpose, and when the imposition of regulations does not serve the stated purpose, such imposition is inappropriate. All too often, the provisions of the Communications Act of 1934 have been applied and reapplied, without modification or adjustment, to new situations or services whose origins are completely unrelated to the situations or services that served as the genesis for the creation of the provisions. It is standard judicial practice to analyze the legislative history of statutory provisions so that it may be discerned whether, in any given instance, a statute's provisions are being implemented in accordance with their original and intended, and therefore appropriate, purpose.

The *raison d'etre* of the provisions of Title II of the Act, which have remained essentially unchanged since 1934, was a fervent desire on the part of Congress and the Commission to curb the potential for abuse of monopoly power that could be exercised by the only two purveyors of interstate communications in existence at the time — telegraphy and telephony. Without the checks and balances that come with competition, rate regulation on state and federal levels and careful monitoring of entry and exit from service provision were necessary to protect the public from unscrupulous business practices that could negatively affect an essential service. The last decade has seen an overwhelming transformation of the telecommunications industry; a transformation that has totally invigorated the market for the delivery of communications and information services. The monopolization of the provision of telecommunications services has been virtually eradicated by the entry of competitors, encouraged in great part by the passage of the Telecommunications Act of 1996. Yet, as a former FCC chairman has mused, "[o]ld regulatory habits rarely die, and frequently they do not even fade away. While the Commission often has been at the forefront of regulatory

change, it occasionally has had to be carried kicking and screaming into the new regulatory era."[6]

The purpose behind imposing Title II regulations upon landline common carriers is arguably defunct, and landline carriers can certainly muster enough evidence to prove to Congress and the Commission that the forces of marketplace competition have replaced the need to regulate monopolistic behavior. It is not appropriate, however, to take these outdated provisions and apply them to a new breed of common carrier provider, under the guise that it levels a very old playing field. The Commission is currently faced with a similar dilemma in the case of Internet telephony. To the extent that Internet telephony software permits the placement of long distance voice calls, it is like interexchange service, and this similarity has prompted certain long distance carriers to petition the Commission to regulate Internet telephony software providers like interexchange carriers.[7] In speculating on how the Commission plans to act on this regulatory request, FCC Chairman Reed Hundt has stated, "we shouldn't be looking for ways to subject new technologies to old rules. Instead, we should be trying to fix the old rules so that if those new technologies really are better, they will flourish in the marketplace."[8] This same philosophy must hold true in the case of CMRS offerings.

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[6] Dean Burch, *"Common Carrier Communications by Wire and Radio: A Retrospective,"* 37 Fed. Com. L.J. 85, 86 (1985).

[7] *See In re* The Provision of Interstate and International Interexchange Telecommunications Services via the "Internet" by Non-Tariffed, Uncertified Entities: America's Carriers Telecommunications Association, *Petition for Declaratory Ruling, Special Relief and Institution of Rulemaking,* RM No. 8775 (filed March 5, 1996).

[8] Internet FAQ with Chairman Reed Hundt, HTTP://www.fcc.gov (1996) at 1.

After the full implementation of the Telecommunications Act of 1996, there will no longer be monopolies providing local exchange service. Until that time, the cornucopia of service choices that CMRS presents to the public is a positive advancement toward the fulfillment of the goal of Congress and the Commission to ensure competition in the local exchange market. By withdrawing from the regulation of telecommunications services and permiting popular choice and market forces to guide the shape of the industry, the Commission will fulfill the legislative intent. However, subjecting a developing alternative to landline telephone service, such as CMRS, to the burdens and expense of complying with outdated regulations such as those promulgated under Title II is inappropriate, and would be a shameful perpetuation of an old regulatory regime that has run its course. With respect to tariff filing, in particular, the Commission has noted that in a competitive environment, requiring tariff filings can inhibit competition by taking away a carrier's ability to rapidly respond to changes in demand and cost, removing incentives for price discounting and the introduction of new offerings, and imposing administrative costs on carriers which lead to increased rates for consumers.[9]

If landline common carriers have a problem with the continued requirement to comply with burdensome Title II provisions, then they should approach the Commission with the abundance of evidence that exists to prove that the competitive state of the industry has rendered the purpose of Title II regulations obsolete. Landline carriers should use the advent of CMRS as an example! It is ludicrous to permit landline carriers to grab hold of the CMRS providers in their midst, as a drowning man frantically clings to his life-saver, and drag them

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[9] *Second Report and Order*, 74 RR 2d at ¶ 178.

into the same Title II quagmire in which they have been floundering for more than three decades. Imposing Title II regulations on CMRS licensees — regardless of whether they may provide fixed, as well as mobile, services — serves no legitimate purpose, by either modern or historical standards.

C. State Regulation of CMRS Is Impractical and Disserves the Public Interest

Section 332(c)(3) of the Act expressly preempts the individual states from regulating the entry of or rates charged by any CMRS.[10] The Commission has stated:

> While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [sic] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity.[11]

CMRS licensees, even those who provide fixed services on a co-primary basis with mobile services, must remain free from the burden of disparate state regulation. The inherent capability of mobility of CMRS makes the imposition of various state regulations an administrative nightmare for CMRS licensees. The fact that CMRS services transcend state boundaries means that licensees would be overwhelmed by the need to comply with various, possibly inconsistent, state regulations. Because it is impossible to separate the fixed uses of CMRS from the mobile uses, it is equally impossible for states to determine which aspects of CMRS service they have authority to regulate.

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[10] 47 U.S.C. §332(c)(3).

[11] *Second Report and Order*, 74 RR 2D 835 at ¶23.

The Commission has rejected state arguments that state rate regulation is appropriate when CMRS is a replacement for landline telephone service for a substantial portion of telephone landline exchange service within the state.[12] The Commission cites to the legislative history of the CMRS state preemption provisions, which states:

> If . . . several companies offer radio services as a means of providing basic service in competition with each other such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that states should be permitted to regulate these competitive services simply because they employ radio as a transmission means.[13]

The majority of service areas nationwide, urban and rural, already support competitive options for basic telephone service; typically a landline provider and a cellular provider. It is unlikely that there remains any populated segment of the country that doesn't offer some type of basic service, whether it be a landline carrier or a Basic Exchange Telephone Radio Service ("BETRS") provider. The additional entry of a CMRS basic service provider means the establishment of a competitive service environment that should suffice to protect consumers and guard against unreasonable discriminatory rates and practices without the need for state regulation.

In order to preserve an optimum environment for the growth and development of CMRS, licensees need the ability to rely upon a uniform set of regulations that ensures regulatory parity *among CMRS providers*. Imposing a crazy-quilt of state provisions on CMRS will only stifle the introduction of competition into the current telecommunications

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[12] *Id.* at ¶253.

[13] *Id.*

marketplace, while simultaneously initiating an ineffectual stab at achieving regulatory parity between dissimilar services -- CMRS and landline telephone service.

II. CONCLUSION

Each order that the Commission releases subsequent to the passage of the Telecommunications Act of 1996 is a potential vehicle for the movement of the telecommunications industry in a pro-competitive, de-regulatory direction. The Commission has before it an opportunity to make such a move, and avoid taking a "past is prologue" approach to the regulation of CMRS. It should be evident from the history of common carrier regulation that the application of Title II regulations is no longer necessary or appropriate to safeguard the public interest with respect to the operation of new technologies. In the case of CMRS offerings, the Commission needs to implement a "laissez faire" approach, and permit the tides of the marketplace to govern who shall and shall not exist. There is no better regulator than the common end user.

Respectfully submitted,

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November 25, 1996
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